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IN THE

Supreme Court of the United States

October Term, 1980

No. 79-1490

LAURA B. JACKSON and
LEROY JACKSON,
Petitioners,

vs.

DAVID C. WHERRY, M.D., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Petitioners, Laura B. Jackson and Leroy Jackson, petition this Court for a Writ of Certiorari to Review the Judgment of the District of Columbia Court of Appeals.

I.

OPINIONS BELOW

The Judgment and Memorandum of the District of Columbia Court of Appeals is printed in the Appendix to this Petition. (Appendix 1a) (Appendix 1b).

II.

JURISDICTION

The Judgment of the District of Columbia Court of Appeals was dated and entered on October 9, 1979. The Judgment and Order denying Motion for Rehearing en banc and for reconsideration, was entered on December 5, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1234(1).

III.

QUESTIONS PRESENTED

(1)Whether a jury instruction on the doctrine of informed consent which charges members of the allied medical professions, such as registered nurses, dentists, non-surgical medical specialist or persons possessing a normal degree of medical knowledge, with surgical knowledge equal to that of an attending surgeon thereby foreclosing those groups of litigants from the benefit of the doctrine in medical and malpractice cases constitutes denial of equal protection of the laws and an invidious form of discrimination?

(2) Whether, in a medical malpractice action brought by a Registered Nurse who was injured by a surgeon during the course of a surgical procedure, i.e., a thyroidectomy, the burden of proving (a) a standard of care, (b) a departure from the standard, (c) and a causal relationship connecting that departure with physical injury constitutes a denial of due process of law, a denial of privileges and immunities, and a denial of equal protection of the laws.

(3) Whether during the Trial of a Medical Malpractice case during which a surgeon fails to put on affirmative

proof to rebut proof of negligence thereby commanding the court, sua sponte, to direct a verdit in favor of the plaintiff, and that Court fails to direct such a verdict, sua sponte, such failure constitutes an abridgement of privileges and immunities guaranteed to party litigants?

(4) Whether constitutional mandates guaranteeing privileges and immunities and equal protection of the laws to citizens and party litigants, all inclusively, to Trial Courts and Reviewing Courts alike, whether technical rules of evidence are adherred to or not during the course of Trial, and therefore impose a higher duty upon courts to take care that those privileges and immunities and equal protection of the laws are preserved at all times thereby reflecting the supremacy and superiority of Constitutional law principles when compared with technical rules of evidence? Whether such failure constitutes a denial of due process of law?

IV.

CONSTITUTIONAL PROVISIONS

Amend. XIV, Sec. 1, U.S. Const.

V.

JURY INSTRUCTION INVOLVED

"I would like now to instruct you on the primary issue of this case which is informed consent. Every physician has a duty to make a reasonable disclosure to his patient of all the significant facts which are necessary to allow the patient to intelligently consent to a proposed operation.

A patient has a right to determine what shall be done with her own body, and because she is a layman she must look to her physician for advice and information. A physician is not liable to a patient if he acts with due care to provide the necessary information to the patient before the patient consents to the operation.

Due care requires that a physician warn a patient of risk to her well-being which an operation may involve. A physician also has a duty to disclose alternatives to a proposed operation and the probable results and dangers involved in each procedure.

However, a physician is not required to discuss with a patient risks which are extremely unlikely or remote. Neither is a physician required to discuss alterrnatives to surgery which are not feasible. A physician's duty to disclose information to a patient is measured by conduct which is reasonable under all circumstances of that particular patient's case which includes due regard to the patient's physical, mental and emotional condition.

A physician's duty does not depend upon the patient's request for information. The scope of a physician's obligation to disclose information to a patient is measured by the patient's need for information. In general, a patient needs that information which is material to her decision. Information is material when a reasonable person – what the physician knows or should know to be the patient's position would be likely to attach significance to the information concerning risk or alternatives in deciding whether or not to forego the proposed operation. All information which would actually affect the patient's decision should be revealed.

However, this is not to be analyzed by hindsight but rather in light of the situation in which the patient found herself prior to undergoing the operation.

If you find that Dr. Wherry failed to disclose material information concerning the risk of all the alternatives to the operation performed on Mrs. Jackson you still may not find him liable to her unless you also determine that the failure to disclose caused Mrs. Jackson to have the operation when she otherwise would not have had it.

To make this determination you must ask yourself would a prudent person in Mrs. Jackson's position have had an operation in any way even if they were informed of all alternatives and risks of significance. Even if you find that some people would not have had the operation, if all significant information was disclosed, if you find that Mrs. Jackson would have had it anyway, your verdict must be for Dr. Wherry on the informed consent issue.

If you find that material information concerning risk or alternatives was not disclosed to Mrs. Jackson, that Mrs. Jackson was unaware of the risk and that Mrs. Jackson would not have gone ahead with the operation if she had had this information then your verdict must be for Mrs. Jackson on the issue of informed consent.

However if you find that Mrs. Jackson would have had the operation even if all material information were disclosed your verdict must be for Dr. Wherry on this issue.

Now, every human being of adult years and some not has a right to determine what shall be done with his or her own body. True consent of what happens to oneself is the informed exercise of the choice, and that entails

an opportunity to evaluate knowledgeably the options available and the risk attendant upon each.

Although the average patient has little or no understanding of the medical arts and must normally rely on the physician for enlightenment with which to reach an intelligent decision there are some patients by virtue of their schooling and training who are able to rely on their own knowledge in evaluating the risks and in reaching an intelligent decision.

Therefore, you are instructed that the need for information of a particular patient varies according to his or her familiarity with the medical arts and the standard for measuring the performance of the physician's duty to disclose is conduct which is reaseonable under the circumstances."

VI.

STATEMENT OF THE CASE

This cause was tried twice in the Superior Court of the District of Columbia.

A. *Trial Number I.*

The petitioner, a registered nurse, and her husband, brought this action in the Superior Court of the District of Columbia seeking damages due to (a) Negligence, (b) Misrepresentations (Fraud and Deceit), and (c) Breach of Contract. After the cause was put to issue, the Respondent moved for Summary Judgment which was opposed by the Petitioners. On June 27, 1978, the Trial Court denied the Respondent's Motion for Summary Judgment in chief and further granted the Respondent's Motion for Summary Judgment on the issue of Punitive

Damages. The cause then proceed to Trial before the Trial Court on the following theories, namely: Negligence, Breach of Contract, and Misrepresentation (Fraud and Deceit). Upon completion of the Petitioner's case in chief, the Respondent moved for a directed verdict. The Court should note that during the first trial, the Defendants named were as follows: David C. Wherry, M.D., Sibley Memorial Hospital, and Gregory DiCarlo. The Trial Court granted Motions for Directed Verdict as to Defendant DiCarlo. Petitioners dismissed the cause against Sibley Memorial Hospital.

The Respondents proferred evidence to rebut the Petitioners case and upon completion thereof, the cause was submitted to the Jury for its deliberations. The jury was returned as "hung" and upon Motion, the Court declared a Mistrial. Whereupon, the matter was scheduled for a second trial.

B. *Second Trial:*

The petitioners proceeded to Trial on the same causes of action, namely, (a) Negligence, (b) Breach of contract, and (c) Misrepresentation (fraud and deceit). The Trial Court improperly restricted the second trial on the negligence count, to the issue of lack of informed consent.

The Petitioners proceeded to put on proof on the issues of negligence, Breach of Contract and Misrepresentation (fraud and deceit). Of critical importance is the fact that the Respondent Wherry never proferred any evidence to rebut evidence adduced by the Petitioners. (*Trans. pp. 298-300*). The only witness called by the Respondent, Wherry was the female Petitioner, Mrs. Laura B. Jackson. During questioning by

Defense Counsel, as part of defendant's case, the female Petitioner was shown Defense Exhibit #4, captioned: Consent to Operate, Anesthesia and Other Medical Services, dated November 3, 1975. Whereupon, the Respondent rested his case. At this juncture, the Court was required, sua sponte, to direct a verdict for the Petitioners on the issue of liability. It did not do so however. The Court instructed the Jury on the issue of lack of ilnformed consent as the only issue. (*Trans. pp. 323*).

The case was submitted to the Jury for its deliberations. After several hours, the jury returned a verdict for the Respondent Wherry.

Petitioners prosecuted their appeal in the District of Columbia Court of Appeals. The full text of the District of Columbia Court of Appeals' decision is found in the Appendix 1a to this Petition.

VII.

STATEMENT OF FACTS

On or about November 3, 1975, female Petitioner was admitted to Sibley Memorial Hospital by Respondent Wherry to undergo surgery for the removal of a recurrent thyroid goiter. Petitioner was a registered nurse. Petitioner alleges that the Respondent Wherry orally contracted and agreed that he would perform the surgery for an agreed price and that Petitioner would not suffer any injuries. Respondents Wherry further promised that Petitioner's original complaints related to swallowing and breathing would be corrected by such surgery.

On November 4, 1975, Petitioner underwent surgery for the removal of a goiter. During the surgery, Respondent Wherry severed Petitioner's right recurrent laryngeal nerve which controls the movement of her vocal cords. Petitioner's course was uneventful as far as any of the parties knew, and on November 10, 1975, she was discharged.

After Petitioner's discharge from the hospital, she was given several post-operative office visits to Respondent Wherry's Office. Respondent never detected that he had indeed severed Petitioner's right recurrent laryngeal nerve which controlled her voice box. Petitioner was prescribed cough medicine due to hoarseness. It was not discovered until a referral was made to Dr. Louis Balla, who performed an indirect laryngoscopy i.e., the patient sits in a chair and the tongue is pulled back while the physician uses a small mirror with a little light which is projected far down the throat. The patient is told to breathe and say "ah! ah!" – in and out, panting. This allows the vocal cords to move together and then the physician can see what happened in the voice box." (*Trans. Tr. pp. 282, lines 20-25*). Upon completion of the examination by Dr. Balla, Respondent Wherry was advised that the Petitioner's vocal chords were not moving. Conclusively, Dr. Balla determined that the paralysis was caused by the surgery. Dr. Balla concluded that Petitioner's paralysis had to have been caused by the surgery since he knw that " * * * * * because Mrs. Jackson had the operation and this is a common concern to all surgeons performing operations on the thyroid not to injure the nerve which is moving the vocal cord." (*Trans. Tr. pp. 284, lines 8-13*).

Mrs. Laura B. Jackson, female petitioner, testified at trial that she was age 55 and was trained as a nurse, by

profession, having graduated from Columbus Medical Center, Columbus, Georgia. During Petitioner's nursing training, she studied courses in microbiology, anatomy, chemistry,, medicl and surgical nursing. (*Trans. p. 5, lines 17-19*). Petitioner testified that she did not remember anything about the laryngeal nerve. (*Trans. p. 7, lines 14-17*). Petitioner also testified that during the three (3) months assignment to the operating room, she observed operations for kidney, appendix removal, and tonsil removals. (*Trans. pp. 9-10*).

After graduation from nursing school, Petitioner worked as a private duty nurse but never cared for patients who had undergone thyroidectomies. (*Trans. p. 12*). Petitioner then worked fo rthe City/County Hospital. During this period she nursed above five (5) patients who had undergone thyroidectomies but had not partcipated in the surgery. (*Trans. p. 14*).

In April, 1955, Petitioner noticed an enlarged lump on the left side of her neck. She then saw a physician by name of Dr. Luther Wolff in Columbus, Georgia. Dr. Wolff advised Petitioner to have surgery for removal of an enlarged thyroid gland. (*Trans. pp. 16-17*). Prior to the surgery by Dr. Wolff, Petitioner was never advised that she could undergo radioactive iodine treatment instead of surgery, nor was she advised that there was a possibility of severance of her larryngeal nerve. (*Trans. p. 18, lines 2-18*). Petitioner underwent the Surgery and suffered no complications.

In June, 1962, Petitioner came to Washington, D.C. and obtained employment at the National Institutes of Health where she worked for approximately eight (8) months. Thereafter, Petitioner transferred to Walter Reed Army Medical Center, Washington, D.C. where

she was first assigned to the Pediatrics Ward for five (5) years and the Orthopedic Ward for an additional five (5) years. (*Trans. pp. 23-24*). During the entire period of employment at Walter Reed Army Medical Center, Petitioner had never participatred in a thyroidectomy operation nor did she ever have an occasion to consult medical text for information pertaining to thyroidectomies. (*Trans. p. 24, lines 11-23*).

In 1972, Petitioner noticed that she had an enlarged thyroid gland on the right side of her neck.[1] (*Trans. p. 25, lines 15-16*). She then saw Dr. Neil Kennedy and continued under his care from 1972 to 1975. During this period, Dr. Kennedy prescribed thyroid tablets which were designed to suppress the growth of the thyroid. (*Trans. p. 26, lines 1-22*). In September, 1975, Dr. Kennedy recommended that Petitioner see a surgeon by the name of Dr. David C. Wherry, the Respondent named herein. Dr. Kennedy contacted Dr. Wherry and made an appointment for Petitioner. (*Trans. p. 28, lines 10-13*). Respondent, Wherry, performed an examination of the Petitioner's neck and referred her further to consult a Dr. Balla. (*Trans. p. 28, lines 19-23*). Another consultation was obtained from a Dr. Thomas who performed a Barium Swallow, X-rays study. The X-rays revealed an enlargment of the right thyroid gland, a goiter pressing on petitioner's trachea. (*Trans. p. 29, lines 20-23*). Petitioner was given another appointment by Respondent Wherry after examinations by Dr. Thomas and Dr. Balla. During the second appointment, Petitioner was

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[1]Comparatively, the Court should note that the Operation performed by Dr. Wolff at Columbus, Georgia in 1955, was for the removal of an enlarged goiter on the *left side* of Petitioner's neck. (emphasis supplied).

told by Respondent Wherry that she had an enlarged thyroid gland and a goiter that was pressing on her trachea. It was during this visit that Respondent Wherry recommended that Petitioner undergo surgery, but not to wait for ten (10) years to have the surgery because "it" was growing and needed to be removed. It wasn't an emergency operation. (*Trans. p. 35, lines 7-14*). Respondent Wherry promised petitioner that her swallowing problem and respiratory problems would be relieved by the operation. (*Trans. p. 36, lines 1-22*). Respondent Wherry assured petitioner that she would have no complications resulting from the surgery. (*Trans. p. 39, lines 14-20; Trans. p. 40, lines 1-11*). Whereupon, Respondent Wherry told Petitioner to go home and think about having the surgery and to let him know when she had decidded and what she had decided.

After Petitioner had discussed the proposed surgery, suggested by Respondent Wherry, with her husband, the male Petitioner herein, as best she could, she called Respondent Wherry and made another appointment to see him at his office. During the third appointment, Petitioner informed Respondent Wherry that she had decided to undergo the surgery.

On November 3, 1975, Petitioner entered the Sibley Memorial Hospital. (*Trans. p. 47, line 25*). During admission to the Hospital, Petitioner was required to sign a consent form agreeing to the operation. (*Trans. p. 48, lines 1-14*). Petitioner signed the consent form presented to her.

On November 4, 1975, Petitioner underwent surgery, postoperatively, and up to the date of discharge, Petitioner's voice remained very hoarse, she couldn't get her words out. (*Trans. pp. 50-51, lines 23-25*). On one occa-

sion, Dr. Wherry told Petitioner "I don't like the sound of your voice!" On November 10, 1975, Petitioner was discharged from the Hospital. Petitioner's first postoperative visit to Respondent Wherry's office was November 25, 1975. There were five (5) additional visits but at no time did Respondent Wherry advise Petitioner that something had gone wrong during the operation. Respondent Wherry further concealed the fact – which he did not know – but should have known – in that he prescribed cough syrup to clear up petitioner's hoarse voice. In December, 1975, Respondent Wherry again referred petitioner to see Dr. Louis Balla. Dr. Balla performed an indirect laryngeoscopy and found that petitioner's right recurrent laryngeal nerve had been severed or traumatized, during the surgery in November, 1975. (*Trans. pp. 57-59*). Dr. Balla then called Respondent Wherry and related his findings to him.

Petitioner testified that since the operation, she has been severely handicapped, the respiratory problems and swallowing problems have continued and she is unable to talk on many occasions due to extreme hoarseness. (*Trans. pp. 63-65*). When Petitioner continued to complain to Respondent Wherry about mucus in her throat, Respondent Wherry prescribed cough syrup. (*Trans. p. 66, lines 1-8*).

During the Second Trial of the cause, the Respondent, Wherry, did not take the witness stand in defense of his case. Rather, Respondent Wherry relied upon his adverse testimony which was elicited from him during the Petitioners' case in chief.

The Court instructed the jury on what it described as the "primary issue of this case which is informed consent." The Trial Court's Instructions are more fully set forth hereinbefore in this Petition. At the conclusion of

the Jury Deliberation, a verdict for the Respondent was entered.

Petitioners prosecuted an Appeal in the District of Columbia Court of Appeals. In affirming the judgment of the Trial Court, the Court of Appeals ruled that the issue of informed consent was not properly before the Court for the reason that no objection was raised; that the Respondent's failure to "present direct evidence of rebuttal nor his testimony (as part of Petitioners' case in chief) at trial rises to the level of an admission of liability, in denying petitioners argument that the Trial Court was duty bound, sua sponte, to direct a verdict in favor of Petitioners; and finally, in a medical malpractice case, in order to prove negligence, a party litigant must prove the applicable standard of care, conduct, that breaches that standard, and a causal relationship between conduct and injury complained of.

VIII.

REASONS FOR GRANTING THE WRIT

1. The District of Columbia Court of Appeals has rendered a decision in conflict with the decisions of other Courts of Appeals on the same question. That is to say, in the granting of an Instruction to a Jury on the question of Informed Consent, the Court of Appeals of the District of Columbia sanctioned the Trial Court's discriminatory application of the doctrine by excluding physicians from the burden of obtaining informed consents from some patients, who, by virtue of their schooling and training who are able to rely on their own knowledge in evaluating the risks and in reaching an intelligent decision. Consequently, a large identifiable group of party litigants such as physicians, nurses, den-

tists, physical therapists and practical nurses, hospital rank-and-file employees, having experience in surgical aspects of various procedures by virtue of work-related training are denied protection of the doctrine of Informed Consent in medical malpractice cases. In short, the surgeon is not required to (a) tell members of that class of party litigants the diagnosis, (b) the general nature of the contemplated procedure, (c) the risks involved, (d) the prospects of success, (e) the prognosis if the procedure is not performed, and (f) the alternative methods of treatment, if any. *Canterbury v. Spence, 150 U.S. App. D.C. 263, 465 F.2d 772 (1972); Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 129, 105 N.E. 92, 93 (1912); Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093, clarified and reh. den., 187 Kan. 186, 354 P.2d 670 (1960); Wall v. Brim, 138 F.2d 478 (C.A. 5th, Ga., 1943).* The only exception to the rule that a surgeon must, under all circumstances, obtain the informed consent from his patient, whether he or she be a Registered Nurse, (*Jones v. Sugar, 18 Md. App. 99, 305 A.2d 219 (1973), contra*), physician not having a surgical specialty, dentists, etc., is during an emergency situation. *Natanson v. Kline, supra; Bang v. Charles T. Miller Hospital, 251 Minn. 427, 88 N.W. 2d 186 (1958); Corn v. French, 71 Nev. 280, 289 P.2d 173 (1955).*

Exclusion of Nurses, Physicians, Dentists, and all other members of the allied medical profession from the benefit of the doctrine of informed consent prior to surgery constitutes and invidious form of discrimination and a denial of privileges and immunities in contravention of the Fourteenth Amendment, Section 1, United States Constitution.

II. In medical malpractice negligence cases, a party litigant need not adhere to superficial criteria established

by *stare decisis* where the primary issue in the case is informed consent. In cases where no informed consent is the primary issue in the case, plaintiffs need not show nor need they prove (a) standard of care, (b) departure from that standard, and (c) causal relationship for the reason that the damages related to the cause of action for uninformed consent arise, not because the procedure was performed unsatisfactorily, but because it was performed at all. *Darrah v. Kite, 32 App. Div. 2d 608, 301 N.Y.S. 2d 286 (2d Dept, 1969);* Compare, *Robbins v. Footer, 179 U.S. 389, 392, 553 F.2d 123, 126 (1973); Kosberg v. Washington Hospital Center, 129 U.S. App. D.C. 322, 324 F.2d 947, 949 (1968); Harris v. Cafritz Memorial Hospital, 364 A.2d at 137 (1976), cert. den, 430 U.S. 968 (1976); Haven v. Randolph, 161 U.S. App. D.C. at 150, 494 F.2d at 1069 (1974).* The imposition and application of time-worn criteria of negligence in medical malpractice cases conflicts with the basic doctrine of lack of informed consent and is therefore a denial of equal protection of the laws. Consequently, the Court of Appeals, by affirming the Trial Court's Judgment, decided an important question in a way which conflicts with applicable state law.

III. The Judgment and Order entered by the District of Columbia Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by the lower court, as to call for an exercise of this court's power of supervision and establishment of correct guidelines regarding burden of proof during trials. As a general rule, the admissions made by a physician during the course of trial, constitutes direct evidence of negligence and want of proper care. *Young v. Fishback, 104 App. D.C. 372, 262 F.2d 469 (1958); Goodwin v. Herzberg,*

91 App. D.C. 385, 201 F.2d 204 (1952); Byrom v. Eastern Dispensary & Casualty Hosp., 78 App. D.C. 42, 136 F.2d 278 (1943); Christie v. Callahan, 75 App. D.C. 133, 124 F.2d 825 (1941); Washington Hospital Center v. Butler, 127 App. D.C. 379, 384 F.2d 331 (1967). *Haven v. Randolph, supra,* does not stand for the proposition that once Plaintiffs have made out a prima facie case, a defendant physician-surgeon is relieved of the burden of going forward with evidence constitutes a far departure from the accepted and usual course of judicial proceedings. Where a party has produced prima facie evidence of negligence, the burden of producing rebuttal evidence to escape an adverse decision based on an uncontested prima facie case shifts to the defendant. *Kalo Inoculant Co. v. Funk Bros., 440, 333 U.S. 127 (1947); Tendler v. Jaffe, 203 F.2d 14, 92 U.S. App. D.C. 2 (1953), cert. den., 74 S.Ct. 29, 346 U.S. 817.* Court rules which impose lesser requirements upon party litigants constitute a denial of equal protection of the laws.

IV. Specious objections to already existing Court practices and rules are not required in the face of a higher duty imposed upon courts of Law to take care that the laws are faithfully executed and that party litigants are guaranteed due process of law during the course of Jury Trials. *Rule 51, S.C.R.* and *Rule 51 Fed. R. Civ. Proc.* provide that no party may assign error the giving of or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict. The Trial Court in the instant case specifically instructed the jury that the primary issue in the case was one of informed consent. To object to the primary issue in the case, via instruction, would be tantamount to an objection to the case in toto. Consequently, instructions

on informed consent submitted by a party litigant and rejected by the Trial Court with a similar instruction prepared by the Trial Court does not impose a duty upon plaintiffs or defendants to object. A request for a further instruction may be in essence equivalent to an objection to the charge. *Montgomery v. Virginia Stage Lines, Inc., 191 F.2d 770 (App. D.C. 1951); Atlantic Coast Line Co. v. Burkett, 192 F.2d 941 (C.A. 5th, 1951).* More important is the rule which declares that where the trial court's instruction contains fundamental error, an appellate court will reverse even in the absence of proper objection. *Mazer v. Lipschutz, 327 F.2d 42 (C.A. 3d, 1963); Wirtz v. International Harvester Co., 331 F.2d 462 (C.A. 5th, 1964); Sowrizal v. Hughes, 333 F.2d 829 (C.A. 3rd 1964).*

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Petition for Writ of Certiorari to review the Decision of the District of Columbia Court of Appeals be granted; That an Order to that effect be entered, and the Court below and the Counsel be notified of the granting of the Petition.

Respectfully submitted,

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APPENDIX A

DISTRICT OF COLUMBIA
COURT OF APPEALS

[Filed Oct. 9, 1979
Alexander L. Stevas, Clerk]

No. 13970

LAURA B. JACKSON, ET AL.,
Appellants,

v. No. CA 1906-77

DAVID C. WHERRY, ET AL.,
Appellees.

Appeal from the Superior Court of the
District of Columbia,
Civil Division

(Hon. Norma Holloway Johnson, Trial Judge)

(Argued September 18, 1979 Decided October 9, 1979

Before: Kelly, Kern and Harris, Associate Judges.

MEMORANDUM OPINION AND JUDGMENT

Laura B. Jackson (hereafter appellant) and her husband sued appellee Wherry for medical malpractice. They appeal a jury verdict for appellee, contending not only that the court erred in failing to sua sponte direct a verdict in their favor but also that the jury verdict finds no support in the evidence adduced at trial.[1] We affirm.

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[1]Appellant also urges that the trial court erroneously restricted its jury instructions to the issue of informed consent. This issue is not properly before us, however, because appellants failed to object to the instructions before the jury retired to deliberate. Super. Ct. Civ. R. 51; *Manes v. Dowling,* D.C.App., 375 A.2d 221, 224 (1977).

On November 4, 1978, appellant Jackson, a registered nurse with a history of thyroid problems, underwent surgery at Sibley Memorial Hospital for the removal of a thyroid goiter.[2] During post-operative examinations, Jackson's surgeon, appellee Wherry, noticed that her voice was hoarse, but did not know whether the hoarseness was attributable to an injured tracheal tube, to improper functioning of the vocal cord, or to a traumatized laryngeal nerve. In December 1975, Dr. Wherry referred appellant to an ear, nose, and throat specialist, who determined that her hoarseness resulted from a paralysis of the vocal cord, a condition probably caused by the traumatization of the laryngeal nerve. Believing the paralysis was caused by Dr. Wherry, the Jacksons sued him for negligence, breach of warranty, and misrepresentation.[3]

Appellant presented testimony at trial to show that traumatization of the laryngeal nerve and the resulting malfunctioning of the vocal cords are known, but minimal, risks associated with the performance of a thyroidectomy. There was also evidence that traumatization, when it occurs, most commonly happens when the nerve is dissected from the surgical area before removal of thyroid tissue. There are, however, other ways not directly associated with surgical technique in which it can occur.

[2]The November 4 thyroidectomy was the second operation Mrs. Jackson had undergone for thyroid problems. Her first was performed in 1955 in Columbus, Georgia.

[3]The suit originally included another physician and Sibley Memorial Hospital as defendants. The trial of that case ended in a mistrial, and by the second trial, appellee was the only defendant. It is the judgment in the second trial from which this appeal is taken.

Appellant testified that she had no knowledge of the risks associated with thyroidectomies before she gave her consent for the operation, either from appellee Wherry's disclosure or from her training and experience.[4] Dr. Wherry, on the other hand, testified that he had informed Mrs. Jackson of all the operative risks, including the possibility of traumatization or severance of the laryngeal nerve. At the close of the evidence, there was no motion for a directed verdict and the case was submitted to the jury on the issues of negligence and informed consent. The jury returned a verdict in favor of appellee.

Appellant urges that the trial court erred in failing to sua sponte direct a verdict in her favor.[5] We disagree.

[4]The record reveals that Mrs. Jackson's testimony on this issue suffered extensive impeachment on cross examination.

[5]In support of her position, appellant argues that since appellee presented no direct evidence to contradict the case in chief, he failed to carry his burden of rebuttal and thereby admitted liability. She also asserts that appellee's testimony at trial that her laryngeal nerve had been traumatized constituted an admission of liability that was conclusive on the issue of negligence. These arguments are without merit. For appellant to have been entitled to a directed verdict, the evidence of negligence, when viewed most favorably to appellee, would have had to have been "so clear that reasonable men could reach but one conclusion." *Bauman v. Sragow*, D.C.App., 308 A.2d 243 (1973). Neither appellee's failure to present direct evidence of rebuttal nor his testimony at trial rises to the level of an admission of liability.

Appellant has also called the attention of the court to appellee's answers to her pretrial request for admissions. Appellant failed to introduce the request and answers at trial, however, and consequently they are not properly in the record before us. *Cf. Butler v. McCalip*, D.C.Mun.App., 54 A.2d 644, 645 (1947) (deposition not offered in evidence cannot be considered as part of record on appeal).

The evidence in the record before us does not meet this test.[6]

Appellant's claim that the jury verdict is contrary to the weight of the evidence is without merit. Accordingly, it is

ORDERED and ADJUDGED that the judgment appealed from be and hereby is affirmed.

PER CURIAM.

For the Court:

/s/ Alexander L. Stevas
Alexander L. Stevas,
Clerk.

Copies to:

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Clerk, Superior Court of the District of Columbia

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[6]Indeed, from the evidence in the record, we are not convinced that appellant even established a prima facie case of medical malpractice. *See Robbins v. Footer,* 179 U.S.App.D.C. 389, 392, 553 F.2d 123, 126 (1973); *Kosberg v. Washington Hospital Center,* 129 U.S.App.D.C. 322, 324, 394 F.2d 947, 949 (1968) (prima facie case of medical malpractice consists of evidence to show applicable standard of care, conduct that breaches that standard, and causal relationship between conduct and injury complained of).

APPENDIX B

DISTRICT OF COLUMBIA
COURT OF APPEALS

[Filed Dec. 5, 1979
Alexander L. Stevas, Clerk]

No. 13970 JANUARY TERM, 1979

LAURA B. JACKSON, ET AL.,
Appellants,

v. CA 1906-77

DAVID C. WHERRY, ET AL.,
Appellees.

BEFORE: Newman, Chief Judge, Kelly, Kern, Gallagher, Nebeker, Harris, Mack, Ferren and Pryor, Associate Judges.

ORDER

On consideration of appellants' motion for reconsideration and for rehearing en banc, it is

ORDERED by the division that appellants' motion for reconsideration is denied, and it appearing that no judge has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that appellants' petition for rehearing en banc is denied.

PER CURIAM.

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Supreme Court, U. S.
FILED
MAY 2 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

No. 79-1490

LAURA B. JACKSON and
LEROY JACKSON,
Petitioners,

vs.

DAVID C. WHERRY, M.D., et al.,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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IN THE

Supreme Court of the United States

October Term, 1980

No. 79-1490

LAURA B. JACKSON and
LEROY JACKSON,
Petitioners,

vs.

DAVID C. WHERRY, M.D., et al.,
Respondents.

RESPONSE TO
PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA
COURT OF APPEALS

JURISDICTION

The petitioners have invoked the jurisdiction of the Supreme Court of the United States under 28 U.S.C. § 1234(1). The respondent, David C. Wherry, M.D., denies that jurisdiction is proper under such section of the United States Code. Further, diligent search of the Code fails to even disclose the existence of the claimed jurisdictional grounds. Subsequent discussion regarding jurisdiction herein will be in reference to 28 U.S.C. § 1257, the proper jurisdictional provision for review of the District of Columbia Court of Appeals by writ of Certiorari.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The petitioners have cited U.S. CONST. amend. XIV, § 1 as a provision involved in this case. Even assuming that the constitutional questions raised by petitioners herein were properly preserved for review by the District of Columbia courts, reliance on the Fourteenth Amendment is misplaced. The District of Columbia is not a "state" within the meaning of the Fourteenth Amendment, and neither the District nor its officers are subject to its restrictions. *See District of Columbia v. Carter,* 409 U.S. 418, 424, 93 S.Ct. 602, 34 L.Ed.2d 613, 620 (1973); *Bolling v. Sharpe,* 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884, 886 (1954).

Additionally, the respondent cites 28 U.S.C. § 2101, Rule 22 of the Rules of the Supreme Court of the United States, and Rule 41 of the Rules of the District of Columbia Court of Appeals as applicable to this case.

QUESTIONS PRESENTED

1. Whether the time requirement of Rule 22 of the Rules of the Supreme Court of the United States for filing a Petition for Writ of Certiorari had expired before the filing herein?

2. Whether the jurisdiction of the United States Supreme Court fails where the federal constitutional questions are raised for the first time on Petition for Writ of Certiorari to the District of Columbia Court of Appeals?

3. Whether the United States Supreme Court will continue to decline review of District of Columbia judgments which rest on independent and adequate "state" grounds?

STATEMENT OF CASE

The petitioner's request for review by Writ of Certiorari to the District of Columbia Court of Appeals arises from an action in medical malpractice tried in the Superior Court of the District of Columbia, Civil Action No. 1906-77. At the second trial of this matter on September 6, 1978, the trial court instructed the jury on two aspects of negligence – lack of informed consent and general negligence. The jury returned a verdict for Dr. Wherry, respondent herein, on all counts, and judgment was entered accordingly.

On appeal to the District of Columbia Court of Appeals, judgment was affirmed in a memorandum opinion filed October 9, 1979. The mandate was stayed pending disposition of the petitioner's motion for reconsideration and for rehearing en banc, which was denied in an order filed December 5, 1979; the mandate issued December 12, 1979. At no stage in the proceedings were the federal questions sought to be reviewed raised by petitioners.

The petition for Writ of Certiorari to the District of Columbia Court of Appeals was filed on March 24, 1980.

ARGUMENT

I. The Petition for Writ of Certiorari to the District of Columbia Court of Appeals herein was not timely filed, nor do sufficient grounds exist to deem the requirement waived.

Rule 22 of the Rules of the Supreme Court of the United States states, in relevant part: "3. A Petition for Writ of Certiorari in all other cases shall be deemed in time when it is filed with the clerk within the time prescribed by law." The applicable law regarding Supreme Court review of a

judgment in a civil action by Writ of Certiorari is found in 28 U.S.C. § 2101(c), which requires application within ninety (90) days subsequent to entry of judgment. Rule 41 of the Rules of the District of Columbia Court of Appeals provides that the mandate shall issue seven (7) days subsequent to the entry of an order denying a timely filed petition for rehearing. The motion for rehearing was denied on December 5, 1979, and accordingly, the mandate issued December 12, 1979. Therefore, the ninety (90) day period within which to file a timely Petition for Writ of Certiorari expired on March 11, 1980. The Petition herein was filed on March 24, 1980.

Although the Supreme Court has held that its Rule 22 is not jurisdictional and that it is subject to waiver by the Court in the exercise of its discretion when the ends of justice so require, *see e.g. Durham v. United States*, 401 U.S. 481, 91 S.Ct. 858, 28 L.Ed.2d 200, 202 (1971), Rule 22 is specific that applications for such extensions are not favored. With respect to the Petition herein, an acceptable reason for extension of the time for filing a Petition for Writ of Certiorari has not been made, even though the time period expired prior to the filing of the Petition for review. Respondent's contention is that no request for extension was made as no acceptable reason for extension of the time for filing a Petition for Writ of Certiorari exists. *See Brody v. United States*, 77 S.Ct. 910, 1 L.Ed.2d 1130 (1957, U.S.); *Carter v. United States,* 75 S.Ct. 911, 100 L.Ed. 1508 (1955, U.S.); *Knickerbocker Printing Corp. v. United States,* 75 S.Ct. 212, 99 L.Ed. 1292 (1954 U.S.). Accordingly, the Petition for Writ of Certiorari to the District of Columbia Court of Appeals should be denied for failure to meet the time requirements of Rule 22 of the Rules of the Supreme Court of the United States.

II. The United States Supreme Court's jurisdiction to review final judgments of the District of Columbia Court of Appeals fails where the federal constitutional issues are raised for the first time on Petition for Writ of Certiorari.

The record in this action, at both the trial and appellate stages , is devoid of any attempts to raise, preserve, or pass upon the federal constitutional issues which petitioners seek to have reviewed by this Court. It was very early established that the Supreme Court will not decide federal constitutional issues raised for the first time on review of state court decisions. *Crowell v. Randell,* 10 Pet. 368, 9 L.Ed. 458 (1836). The Supreme Court has consistently refused to decide federal constitutional issues raised for the first time on such review in a long line of cases subsequent to the *Crowell* opinion. *See e.g. Cardinale v. Louisiana,* 394 U.S. 437, 438, 89 S.Ct. 1162, 22 L.Ed.2d 398, 400 (1969); *Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc.,* 360 U.S. 334, 342, n. 7, 79 S.Ct. 1196, 3 L.Ed.2d 1280, 1286 (1959); *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430, 434-35, 60 S.Ct. 670, 84 L.Ed. 849 (1940); *Dewey v. Des Moines,* 173 U.S. 193, 197-201, 19 S.Ct. 379, 43 L.Ed. 665, 667-68 (1899); *Murdock v. City of Memphis,* 20 Wall. 590, 22 L.Ed. 429 (1875). Accordingly, the Petition for Writ of Certiorari to the District of Columbia Court of Appeals should be denied as the federal constitutional issues are raised for the first time in the Petition.

III. District of Columbia judgments which rest on independent and adequate "state" grounds are not subject to review by the United States Supreme Court.

It is a recognized principal that the Supreme Court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the co-presence of federal grounds for decision. *See e.g. NAACP v. Alabama* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); *Fox Film Corp. v. Muller,* 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935). A prima facie case of medical malpractice in the District of Columbia consists of evidence to show the applicable standard of care, conduct that breaches that standard, and a causal relationship between the conduct and the injury complained of. *See Robbins v. Footer,* 179 U.S. App. D.C. 389, 392, 553, F.2d 123, 126 (1973); *Kosberg v. Washington Hospital Center,* 129 U.S. App. D.C. 322, 324, 394 F.2d 947, 949 (1968). From a review of the evidence in the record by the District of Columbia Court of Appeals, certainty that the petitioners herein even established a prima facie case of medical malpractice was not apparent. *Jackson v. Wherry,* No. 13970, Memorandum Opinion and Judgment, fn. 6 (October 9, 1979). Additionally, the petitioners herein failed to object to jury instructions prior to the jury retiring to deliberate. Such matters are not proper for appellate review where no objection is taken at trial. *Id.,* fn. 1; *Manes v. Dowling,* D.C. App., 375 A.2d 221, 224 (1977). Accordingly, the Petition for Writ of Certiorari to the District of Columbia Court of Appeals should be denied as the judgment of the District of Columbia Court of Appeals rests on independent and adequate "state" grounds.

CONCLUSION

The respondent, David C. Wherry, M.D., respectfully requests the Supreme Court of the United States to deny the Petition for Writ of Certiorari to the District of Columbia Court of Appeals filed herein by the petitioners.

Respectfully submitted,

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